

- New York *Mott v. Duncan Petroleum Trans*, 51 NY 2d 289 HN3
- North Carolina *In re Beale's Will*, 202 NC 618 HN2
- North Dakota *Malchose v. Kalfell*, 664 N.W.2d 508 HN2
- Ohio *Hassay v. Metropolitan Life Ins. Co.*, 140 Ohio St. 266
- Oregon *Belton v. Buesins*, 240 Ore 399 HN3
- Pennsylvania *Schroeder v. Commonwealth*, 551 PA 243  
*Rogers v. Johnson & Johnson Products, Inc.*  
 523 PA 176
- Rhode Island *DeMelo v. Zompa*, 844 A 2d 174 HN 6
- South Carolina *Russell v. Wachovia Bank, N.A.*, 353 SC 208 HN 1
- South Dakota *In re Estate of Modde*, 323 NW 2d 895 HN 3
- Tennessee *Stinson v. Daniel*, 220 Tenn 70 HN 1
- Texas *Redman Hcmes v. Ivy*, 920 SW 2d 664 HN10
- Utah *Inter-Mountain Ass'n v. Davies*, 61 Utah 461 HN 1
- Vermont *Westinghouse Elec. Supply Co. v. B.L. Allen, Inc.*, 138 Vt 84  
*In re Hanrahan's Will*, 109 Vt 108 HN 2
- Virginia *Carter v. Williams*, 246 Va 53 HN 2
- Washington *In re Estate of Reilly*, 78 Wn 2d 623 NH4
- West Virginia *Milhoan v. Koenig*, 196 W.Va 163 HN6
- Wisconsin *Lambrecht v. Kaczmarczyk (In re Estate of Kaczmarczyk)*, 2001 Wi 25 HN2  
 (241 Wis. 2d 804)
- Wyoming *Ahrenholtz v. Laramike Econ. Dev. Corp.*, 2003 WY 149 HN4 (79 P.3d 511)

See also 4 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, *Modern Federal Jury Instructions* (2002) (Model Instruction 74-2).

Petitioner urges this Court to grant certiorari.

*Respectfully submitted,*

WILKINSON LAW FIRM

s/Bill V. Wilkinson

Bill V. Wilkinson, OBA No. 9621

7625 E. 51<sup>st</sup> St., Suite 400

Tulsa, Oklahoma 74145-7857

918-663-2252; Fax 918-663-2254

Attorney for Petitioner

## APPENDIX

### IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed

Supreme Court  
State of Oklahoma  
November 21, 2005  
Michael S. Richie  
Clerk

MONDAY, NOVEMBER 21, 2005

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING  
ORDERS OF THE COURT:

99,430 Joe Womack, Guardian ad litem for Georgette Rosa Gomes, an incompetent person, v. HCA Health Services of Oklahoma, Inc., a corporation d/b/a Presbyterian Hospital; University Health Partners; and O.U. Medical Center

**Petition for certiorari is denied.**

CONCUR: Winchester, V.C.J., Lavender, Hargrave, Opala, Edmondson, Taylor, JJ.

DISSENT: Watt, C.J., Kauger (I would grant certiorari to address this question of first impression), Colbert (by separate writing with whom Watt, C.J., joins), JJ.

100,156 Otis Dale Tune v. Lisa Ruth Green

**Petition for certiorari is denied.**

CONCUR: Watt, C.J., Winchester, V.C.J., Lavender, Hargrave, Kauger, Edmondson, Taylor, Colbert, JJ.

DISSENT: Opala, J.

## APPENDIX

- 101,641      Kimberly Coulsen, an individual et al. v. Oscar Lee Owens  
**Petition for certiorari is denied.**  
CONCUR: Watt, C.J., Lavender, Kauger, Edmondson, Colbert, JJ.  
DISSENT: Winchester, V.C.J. , Hargrave, Opala, Taylor, JJ
- 101,691      In the Matter of the Protest and Registration Fee Assessments Under the International Registration Plan for the 2002 and 2003 License Years;  
Freymiller, Inc., v. State of Oklahoma, ex rel., Oklahoma Tax Commission  
**Petition for certiorari is denied.**  
ALL JUSTICES CONCUR
- 102,595      Elizabeth Roth, as Personal Representative of the Estate of Geneva M. Roth, Deceased v. Mercy Health Center, Inc., a/k/a Mercy Health System of Oklahoma, et al.  
**Petition for certiorari to review certified interlocutory order is denied.**  
ALL JUSTICES CONCUR

s/Robert E. Lavender

CHIEF JUSTICE

**APPENDIX**

**IN THE COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA  
DIVISION II**

**THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF  
THE FOLLOWING ORDERS(S):**

99,599            GYPSUM ENTERPRISES, INC., Trustee of  
the Gypsum Enterprises Retirement Fund,  
Plaintiff/Appellee, v. SHERRY WYNNE, s/p/a  
SHERRY S. WYNNE, s/p/a SHERRY  
GIBSON, Defendant/Appellant

Petition for rehearing filed by  
defendant/appellant Sherry Wynne is DENIED.

100,156           OTIS DALE TUNE, Appellant/Plaintiff v.  
LISA RUTH GREEN, Appellee/Defendant.

The petition for rehearing of appellant/plaintiff  
Otis Dale Tune is DENIED.

101,019           BECKY DeMELLO, Plaintiff, and AMANDA  
FANCHER, Plaintiff/Appellant, v. CLASSIC  
CHEVROLET, INC., Defendant/Appellee, and  
STEVE A NALL; RANDALL S. DUNHAM;  
EDWARD R. FARLEY, JR.; and BRIEN E.  
McCORMICK, Defendants.

The petition for rehearing of plaintiff/appellant  
Amanda Fancher is DENIED.

DATED this 26<sup>th</sup> day of August, 2005. ALL JUDGES  
CONCUR.

s/John F. Reif  
Presiding Judge, Division II

**APPENDIX**

**NOT FOR OFFICIAL PUBLICATION**

**Filed**

**Court of Civil Appeals**

**State of Oklahoma**

**July 12, 2005**

**Michael S. Richie**

**Clerk**

**IN THE COURT OF CIVIL APPEALS  
OF THE STATE OF OKLAHOMA**

**DIVISION II**

**OTIS DALE TUNE,  
Plaintiff/Appellant,**

**vs.**

**LISA RUTH GREEN,  
Defendant/Appellee.**

**Case No. 100,156**

---

**APPEAL FROM THE DISTRICT COURT  
OF TULSA COUNTY, OKLAHOMA**

**HONORABLE J. MICHAEL GASSETT, TRIAL JUDGE**

**AFFIRMED**

**Bill V. Wilkinson  
WILKINSON LAW FIRM  
Tulsa, Oklahoma**

**For Appellant**



## APPENDIX

Robert Taylor  
Neil D. Van Dalsem  
KING, TAYLOR & RYAN, P.C.  
Tulsa, Oklahoma

For Appellee

### OPINION BY JANE P. WISEMAN, JUDGE:

This is a traffic accident case in which Plaintiff Otis Dale Tune appeals the trial court's judgment on a jury verdict. The jury found Plaintiff and Defendant Lisa Ruth Green each 50 percent negligent, resulting in a \$3,000 damage award to Plaintiff. Because the verdict is supported by competent evidence, and because the trial court did not err in instructing the jury or refusing to allow a witness to testify as to the ultimate issue of fault, we affirm.

### FACTS

The accident occurred at a busy intersection in south Tulsa. Plaintiff was driving westward; Defendant was coming from the opposite direction, driving eastward; between them were traffic lights above the intersection. Plaintiff moved into a left turn lane in order to make a left turn and go south. While in the intersection, his vehicle was hit by Defendant's vehicle.

Plaintiff sued Defendant for negligence. He asserted he had waited to begin his turn until his traffic light had turned to a protected green arrow, meaning Defendant's light had turned red when she entered the intersection. Defendant asserted Plaintiff negligently began to turn early, while she still had the right of way.

## APPENDIX

During the trial, the trial court made the following decisions that form the basis for Plaintiff's appeal:

- (1) The trial court instructed the jury on comparative negligence;
- (2) The trial court refused to give an instruction on circumstantial evidence; and
- (3) The trial court refused to allow Plaintiff's expert witness – the investigating police officer – to testify as to the cause of the accident.

The jury returned a verdict finding each party 50 percent negligent and finding Plaintiff had sustained \$6,000 in damages. Under Oklahoma's comparative negligence law, the trial court reduced the award to \$3,000 and entered judgment on the verdict. Plaintiff appeals.

## STANDARD OF REVIEW

Where any competent evidence reasonably tending to support a jury verdict exists, "and no prejudicial errors are shown in the trial court's instructions to the jury or rulings on legal questions presented during trial, the verdict will not be disturbed on appeal." *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶ 3, 11 P.3d 162, 166.

## ISSUES

### I. EVIDENCE OF NEGLIGENCE



## APPENDIX

Plaintiff first asserts there was absolutely no evidence presented of his negligence, and the trial court should not have given an instruction on comparative negligence.

If Plaintiff's account of the accident were the only evidence presented, we would agree. Plaintiff testified that while he admittedly anticipated the light turning to the green arrow, he waited in his left turn lane until the light changed to a green arrow, and only then pulled into the intersection.

Plaintiff's evidence was not the only evidence, however, Defendant testified that her light was still green as she approached the intersection. She noticed Plaintiff in the left turn lane preparing to turn across her path. She offered the following account of the events preceding the accident:

As I was coming closer to the intersection, as I'm coming closer, in my mind I know he's going to pull out because he's just -- you just know when someone is going to pull out. I didn't know right then. But I know it turned yellow and I was trying to slow down. And -- when I'm coming to the intersection and it's turning yellow, I know I have to slow down and I can't stop because there was sand on the ground, on the street.

Defendant testified she was three car lengths back from the intersection when the light turned from green to yellow. In braking, she slid on the sand that remained on the ground after a recent snowfall, and while she was trying to stop, Defendant was pulling out to turn. Even under extensive cross-examination, Defendant maintained that her light had to be

## APPENDIX

yellow at the time of the accident. She admitted her light could have been red, but believed it was yellow “[b]ecause right before [the accident] happened, it was still yellow.”

Defendant further testified that Plaintiff had pulled into the intersection getting ready to turn left. Tom Price, traffic operations planning manager for the City of Tulsa, testified the green arrow light would be triggered for Plaintiff only if his vehicle was stopped in the left turn lane; if he was beyond the median on his left and no car was behind him in the left turn lane, there would be no vehicle in the detection area, and the sensor would not activate the light sequence controller to display the green left turn arrow. If no vehicle is detected in the left turn lane, the solid green light will turn to yellow and then to red.

Plaintiff's counsel's first question of Defendant on cross-examination was, “[Y]our story this afternoon to the ladies and gentlemen of the jury is that this accident that occurred out there was not your fault, but was Otis Tune's fault; is that what your testimony is?” Defendant responded, “Yes.”

The Oklahoma Constitution states that in all cases the defense of contributory negligence shall be a question of fact, and at all times shall be left to the jury. Okla. Const. Art. XXIII, § 6. Oklahoma courts have strictly adhered to the Constitutional provision; to wrest this issue from the jury, there must be an utter lack of evidence. *See Bullard v. Grisham Constr. Co.*, 1983 OK 21, ¶ 9, 660 P.2d 1045, 1048.

There was much divergent testimony on the color of the light for each party and where the parties were in the

## APPENDIX

intersection. Given the testimony, the jury could have concluded that either or both Plaintiff and Defendant were at fault in causing the accident. Under the evidence presented, it would have been error not to instruct on comparative negligence. The trial court was correct in submitting this disputed fact issue to the jury for its determination.

### II. CIRCUMSTANTIAL EVIDENCE

Next, Plaintiff asserts the trial court erred by refusing to instruct on circumstantial evidence. Plaintiff argues that this is a classic case of the need to do so because there were no witnesses to testify directly about whether Defendant ran a red light.

His argument ignores the direct evidence given by two witnesses – the parties themselves. Both testified as to what their traffic signal indicated. The undisputed evidence established what the light sequence would be for each party under the circumstances. There simply was no reason to give the instruction. Additionally, Oklahoma Uniform Jury Instruction No. 3.25 states that no instruction should be given regarding direct and indirect evidence. The trial court was correct in refusing Plaintiff's request to give this instruction.

### III. TESTIMONY AS TO CAUSATION

Finally, Plaintiff asserts the trial court erred in refusing to allow the investigating police officer to opine as to who was at fault in the accident. In refusing to allow the witness to

## APPENDIX

testify on this issue, the trial court relied on *Gabus v. Harvey*, 1984 OK 4, 678 P.2d 253.

As in the instant case, *Gabus* concerned a negligence lawsuit arising out of an automobile accident in which one party sought to introduce an investigating police officer's opinion as to causation. The trial court allowed the testimony, and the Oklahoma Supreme Court reversed the resulting jury verdict.

The Court based its decision on portions of the Oklahoma Evidence Code, including 12 O.S. 2001 § 2704, which Plaintiff relies on. Section 2704 states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Court examined Section 2704 in relation to Section 2702, which states that a qualified expert witness may testify in the form of an opinion "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Under the latter statute, "the test . . . is usefulness. Will the expert testimony assist the trier of fact? If not helpful, then expert conclusions or opinions are inadmissible. *Gabus*, 1984 OK 4 at ¶ 16, 678 P.2d at 255.

The *Gabus* court applied the statutes and held the expert's testimony was not helpful because it concerned facts readily appreciated by any driver or pedestrian, and no special skill or knowledge was needed to understand the facts and draw a conclusion. *Id* at ¶ 18, 678 P.2d at 256. The Court also held the testimony was plainly prejudicial because it "put the stamp of expertise upon an issue that the jury was fully competent to decide." *Id* at ¶ 25, 678 P.2d at 257. The Court concluded it



## APPENDIX

was prejudicial error to admit the expert testimony and reversed and remanded for a new trial.

*Gabus* applies to the instant case. Both cases involve the issue of whether an investigating police officer can give an opinion as to the cause of a traffic accident. In both cases, the opinion as to this ultimate issue is not based on special skill or knowledge nor does it rest on highly technical matters requiring special skill to interpret and assist the jury. In the instant case, the matter involved whether the drivers obeyed the traffic signals. These are, as in *Gabus*, "actions within the common knowledge of most jurors, driving a motor vehicle." "*Drake v. Wal-Mart, Inc.*, 1994 OK CIV APP a47, ¶ 18, 876 P.2d 738, 742.

As in *Gabus*, the officer's proposed testimony on causation dealt with matters well within the jury's "normal experiences and qualifications." *Gabus*, 1984 OK 4 at ¶ 18, 678 P.2d at 256. In addition to being unnecessary, it was also prejudicial, because if allowed, it would have, as discussed above, "put the stamp of expertise upon an issue the jury was fully competent to decide." *Id.* at ¶ 25, 678 P.2d at 257. Though Plaintiff argues the trial court should have distinguished *Gabus*, the only way the trial could have done so would have been to ignore it.

Furthermore, Plaintiff's argument that *Gabus* conflicts with Section 2704 is incorrect. As shown above, the Oklahoma Supreme Court considered Section 2704 in deciding *Gabus*. Finally, *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, 952 P.2d 483, which Plaintiff relies on, is distinguishable. In *Williams*, the Supreme Court held it was error not to allow testimony in a condemnation case as to the issue of damages.

## APPENDIX

*Id.* Damages is a different matter than causation, and *Perkins* never considered *Gabus*.

The admissibility of expert testimony is a matter within the discretion of the trial court, and a trial court's decision in this area will not be reversed absent an abuse of discretion. *Sharp v. 251<sup>st</sup> St. Landfill, Inc.*, 1996 OK 109, ¶ 6, 925 P.2d 546, 549. In following *Gabus*, the trial court did not abuse its discretion in refusing to allow the officer to testify as to the cause of the accident.

## CONCLUSION

For the foregoing reasons, the trial court's judgment is **AFFIRMED**.

REIF, P.J., and RAPP, V.C.J. (sitting by designation), concur.

July 12, 2005



**APPENDIX**

**IN THE DISTRICT COURT IN  
AND FOR TULSA COUNTY  
STATE OF OKLAHOMA**

District Court

**FILED**

NOV 21 2003

Sally Howe Smith, Court Clerk  
State of Okla. Tulsa County

OTIS DALE TUNE,  
Plaintiff,

vs.

LISA RUTH GREEN,  
Defendant.

Case No. DJ-2003-737  
Judge Michael Gassett

---

**JOURNAL ENTRY OF JUDGMENT**

NOW on this 8<sup>th</sup> day of September, 2003, this matter came on for jury trial before the undersigned Judge of the District Court. The Plaintiff, Otis Dale Tune, appeared in person and through his attorney, Bill Wilkinson. The Defendant, Lisa Ruth Green, now Flanagan, appeared in person and through her attorney, Robert Taylor.

Both sides having announced ready to proceed with trial, a jury of twelve persons and one alternate was selected and sworn to try the case. Counsel gave their opening

## APPENDIX

statements. The Plaintiff presented testimony from seven sworn witnesses, entered various exhibits into evidence and rested. Whereupon, the Defendant presented testimony from four sworn witnesses, entered various exhibits into evidence and rested. Whereupon, the Plaintiff offered rebuttle [sic] testimony from one sworn witness.

Whereupon, the Court read its instructions to the jury. Counsel presented closing arguments. The alternate juror was dismissed, and the twelve person jury panel received the case and began and [sic] its deliberations on the fourth day of trial, September 11, 2003.

After due deliberation, the jury returned its verdict in open Court on the white verdict form as follows:

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows:

Plaintiff's contributory negligence     50%

Defendant's negligence                             50%

We find the dollar amount of damages sustained by the Plaintiff, without regard to the percentages of contributory negligence of the Plaintiff and the negligence of the Defendant, is the sum of \$6,000.00. This dollar amount will be reduced by the judge by the percentage established in Item 1 above.

The verdict form was signed by the foreman, indicating a unanimous verdict. At the request of the Plaintiff, the Court polled each juror as to whether the verdict form reflected his or

## APPENDIX

her verdict, and each juror indicated that this was his or her true verdict.

Whereupon, the Court accepted the jurors verdict in open Court.

Based upon the jury's verdict, the Court finds that judgment should be entered in favor of the Plaintiff, Otis Dale Tune, and against the Defendant, Lisa Ruth Green, now Flanagan, in the amount of \$3,000.00.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that the Plaintiff, Otis Dale Tune, be, and he is hereby granted judgment against the Defendant, Lisa Ruth Green, now Flanagan, in the amount of \$3,000.00. The Court will consider costs upon application by the parties.

s/J. Michael Gassett  
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:

s/Bill V. Wilkinson  
BILL V. WILKINSON - OBA #9621  
Attorney for Plaintiff

s/Robert Taylor  
ROBERT TAYLOR - OBA #8879  
Attorney for Defendant

I, Sally Howe Smith, Court Clerk, for Tulsa County, Oklahoma,  
hereby certify that the foregoing is a true, correct and full

**APPENDIX**

copy of the instrument herewith set out as appears on record  
in the Court Clerk's Office of Tulsa County, Oklahoma, this

NOV 21, 2003

By s/ Deputy Court Clerk

Deputy

2

No. 05-1072

FILED

MAR 22 2006

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**In The  
Supreme Court of the United States**

OTIS DALE TUNE,

*Petitioner,*

v.

LISA RUTH GREEN,

*Respondent.*

**On Petition For Writ Of Certiorari  
To The Court Of Civil Appeals  
Of Oklahoma, Second Division**

**RESPONSE TO PETITION  
FOR WRIT OF CERTIORARI**

NEIL D. VAN DALSEM  
*Counsel of Record*  
KING, TAYLOR & RYAN, P.C.  
Suite 850 Boulder Towers  
1437 South Boulder Avenue  
Tulsa, OK 74145-7857  
918-749-5566

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## INTRODUCTION

The Defendant/Respondent, Lisa Green, respectfully submits this Brief in Opposition to Plaintiff/Petitioner Otis Tune's Petition for Writ of Certiorari. Mr. Tune asserts that an Oklahoma trial court violated his Fourteenth Amendment right to due process of law by refusing to instruct a jury in a civil case regarding the distinction between direct evidence and circumstantial evidence. Mr. Tune's Petition misstates the factual record, fails on the merits and urges this Court to violate basic notions of federalism.

---

## THE FACTUAL RECORD

This Court limits its review to significant questions of federal law. The question in this case is who had the green light. On January 31, 2000, Mr. Tune and Ms. Green were involved in an automobile accident in Tulsa, Oklahoma. Mr. Tune's vehicle was traveling in a westbound turn lane, and he planned to turn left/south to enter an on-ramp to a southbound highway. When Mr. Tune approached the intersection, his light was a green ball. Oncoming, eastbound traffic prevented Mr. Tune from completing a left turn, but he pulled into the intersection.

Just before the accident happened, Ms. Green was eastbound on the same street, traveling the opposite direction that Mr. Tune was traveling. Ms. Green had a green light as she approached the intersection. When Ms. Green was three car lengths back from the intersection, her light turned yellow. Mr. Tune did not see Ms. Green's vehicle, and he pulled out in front of her. The vehicles collided in the outside, eastbound lane.

Mr. Tune filed this lawsuit, claiming injury. Ms. Green denied liability and damages. The case was tried to a jury in a four-day trial. Mr. Tune claimed that he had a protected left-turn arrow when he pulled in front of Ms. Green's oncoming car. Ms. Green testified that she had a yellow light. A traffic engineer testified that, because Mr. Tune pulled into the intersection, his light would have turned from green, to yellow to red (not to a green arrow). Mr. Tune exaggerated his damages. He asked the jury to award damages for treatment of a pre-existing rheumatoid arthritis condition. He claimed \$259,280.71 in lost income, even though he never missed a day of work after the accident.

The trial court instructed the jury as to all of the relevant points of law, including Ms. Green's comparative negligence defense and the applicable Rules of the Road and Ordinances. The trial court used Oklahoma Uniform Jury Instructions ("OUJIs"), which are required by Oklahoma law. The OUJIs provided a plain English explanation of the jury's duty to evaluate all of the evidence. The OUJIs directed the trial court not to give a jury instruction defining the terms "direct evidence" or "circumstantial evidence."

The jury found that both Ms. Green and Mr. Tune were 50% at fault and set damages at \$6,000.00. The trial court entered a judgment in Mr. Tune's favor in the principal amount of \$3,000.00.

Mr. Tune appealed, arguing that the trial court erred by refusing to give the jury an instruction explaining the difference between direct and circumstantial evidence. A panel of the Oklahoma Court of Civil Appeals rejected Mr. Tune's argument. He petitioned for review with the

Oklahoma Supreme Court, which denied review by an eight-to-one vote. Still disgruntled, Mr. Tune appeals to this Court.

---

## **REASONS FOR DENYING THE WRIT**

### **I. Mr. Tune Failed To Raise A Due Process Argument In The Courts Below.**

This Court ordinarily declines to consider claims that were neither raised nor decided in a lower court. See *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 585, 160 L.Ed.2d 548 (2004). Below, Mr. Tune argued that Oklahoma substantive law required the trial court to instruct the jury regarding the role of circumstantial evidence. In his appeal to this Court, Mr. Tune argues that the Fourteenth Amendment required that instruction. Oklahoma's courts should have been given the opportunity to address the merits of Mr. Tune's due process argument.

### **II. This Case Does Not Involve Any Important Legal Question, Much Less A Significant Question Of Federal Or Constitutional Law.**

Supreme Court Rule 10 explains the considerations governing review on a writ of certiorari in this Court. The Rule (and common sense) dictates that this Court's review is limited to significant issues of federal law. This is an auto accident case that does not involve any significant legal issue whatsoever. Even the Oklahoma Supreme Court, which concerns itself with Oklahoma law, denied review of this case.



### III. The Fourteenth Amendment Does Not Grant Mr. Tune A Substantive Or Procedural Right To A Specific Jury Instruction Explaining The Distinction Between Direct And Circumstantial Evidence.

In relevant part, the Fourteenth Amendment prohibits the states from depriving a person of "life, liberty or property, without due process of law. . . ." Mr. Tune's life or liberty was not taken, so his argument must be that he was deprived of either substantive or procedural due process in the loss of his property.

Oklahoma's handling of Mr. Tune's tort lawsuit does not invoke the concept of substantive due process. A litigant's right to recover on a tort claim involves a state-based right, best left to the discretion and will of the states. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). State law rights, such as those provided by tort or contract law, are not subject to substantive due process protection. *Id.* Mr. Tune did not have a federally-protected, substantive right to a jury instruction that defined the role of circumstantial evidence in a tort lawsuit.

Oklahoma more than satisfied Mr. Tune's right to procedural due process. The basic elements of procedural due process are notice and a fair opportunity to be heard. *See Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). The Fourteenth Amendment does not give the federal government power to tamper with specific procedures used in civil lawsuits filed in state courts. *See Iowa Central Ry. Co. v. Iowa*, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed. 467 (1896); *Northeast Sav., F.A. v. Hintlian*, 696 A.2d 315 (1997). Where a state



court acts in consonance with the state's laws, it is only in very exceptional cases that a federal court will interfere on the ground that there has been a failure of due process, such as when a person's rights are determined without notice. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Jordan v. Com. of Massachusetts*, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912).

Mr. Tune filed the lawsuit, so he did not need notice. He had ample opportunity to be heard in the four-day jury trial. The trial court used uniform jury instructions that were adopted by the Oklahoma Supreme Court, pursuant to legislation enacted by the Oklahoma Legislature. Then, Mr. Tune had the opportunity to appeal to both levels of the Oklahoma appellate court system. Mr. Tune was given much *more* judicial process than the Fourteenth Amendment required.

#### **IV. The Lower Courts Correctly Applied Oklahoma's Prohibition Against Instructing The Jury Regarding The Distinction Between Direct And Circumstantial Evidence, And Oklahoma Law Is Consistent With The Law In Other Jurisdictions.**

Moreover, the trial court followed the requirements of Oklahoma law. The trial court used OUJI instructions that the Oklahoma Supreme Court issued as a result of the enactment of legislation. The enacting legislation requires that "the OUJI instructions shall be used unless the court determines that it does not accurately state the law." Okla. Stat. tit. 12, § 577.2.

The OUJI instructions address whether a trial court should give an instruction regarding "circumstantial evidence." OUJI No. 3.25 states as follows:

Instruction No. 3.25

DIRECT AND INDIRECT [CIRCUMSTANTIAL]  
EVIDENCE - DEFINED - USE

NO INSTRUCTION SHOULD BE GIVEN

In other words, the Oklahoma Supreme Court directed Oklahoma's trial courts not to give the very jury instruction that Mr. Tune requested. Other OUIs, using plain English, instructed the jurors to consider all of the evidence and to use their own judgment and common sense to reach a verdict. *See* OUJI Nos. 1.4, 3.1.

Moreover, case law from Oklahoma and other jurisdictions rejects Mr. Tune's claim that a "direct vs. circumstantial evidence" instruction is either necessary or important. Before the adoption of the OUIs, Oklahoma courts would only instruct regarding the role of circumstantial evidence if a party's case rested *entirely* on circumstantial evidence. *See Chase v. Watson*, 1956 OK 76, 294 P.2d 801. At Mr. Tune's trial, the parties testified about their direct observations of the traffic control lights. The parties' testimony about their observations, although disputed, constituted direct evidence of the relevant facts.

Other courts hold that a circumstantial evidence instruction is either not required or not particularly important. As the Supreme Court of Texas put it, "surely a jury understands that it is its function to make reasonable inferences from proven facts. . . ." *Johnson v. Zurich General Accident & Liability Ins. Co.*, 205 S.W.2d 353, 354 (Tex. 1947). Texas and other jurisdictions have long

followed the rule that a trial court in a civil case is *never* required to give an instruction explaining the role of direct and circumstantial evidence. *Id.*, *Daniels v. Southwestern Trans.*, 621 S.W.2d 188 (Tex. Ct. App. 1981); *Daretz v. Gadbois*, 541 S.W.2d 502, 508 (Tex. Ct. App. 1976); *Pacheco v. Safeco Ins. Co. of America*, 780 P.2d 116, 123 (Idaho 1989). Even when model jury instructions include a "circumstantial evidence" charge, a court's failure to give the instruction does not warrant a new trial. *Campbell v. Wagner*, 708 N.E.2d 539, 542 (Ill. Ct. App. 1999); *Northwestern Nat'l Ins. Co. v. Nemetz*, 400 N.W.2d 33, 41 (Wis. Ct. App. 1986).

#### **V. Oklahoma Recognizes That Circumstantial Evidence Is Admissible And Relevant.**

Finally, Mr. Tune suggests that Oklahoma's courts do not, in a general sense, recognize the category of "circumstantial evidence." That assertion is simply wrong. Oklahoma's Evidence Code, Okla. Stat. tit. 12, §§ 2101-3009 is nearly a verbatim adoption of the Federal Rules of Evidence. Both direct and circumstantial evidence are admissible in Oklahoma's courts. Both categories of evidence were admitted at Mr. Tune's trial. The trial court's refusal to give a specific instruction regarding the distinction between direct and circumstantial evidence did not present Mr. Tune from presenting his case to the jury.



**CONCLUSION**

Mr. Tune received due process of law. His arguments to this Court, which were not made below, are frivolous. In any event, this case does not involve any significant legal issue. Ms. Green respectfully requests that the Court deny Mr. Tune's Petition for Writ of Certiorari.

Respectfully submitted,

NEIL D. VAN DALSEM

KING, TAYLOR & RYAN – OBA #16326  
Suite 850 Boulder Towers  
1437 South Boulder Avenue  
Tulsa, OK 74119  
(918) 749-5566

*Attorney for Respondent*